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No. 09-810

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,

Petitioner,

v.

DUSTIN McDANIEL, in his official capacity as Attorney General, State of Arkansas,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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I

INTRODUCTION

Respondent's patchwork opposition to Grand River's Petition for a Writ of Certiorari ("Petition")[1] denies the existence of a clear Circuit conflict, relies on inapposite case law, and bypasses Grand River's allegations — allegations that at least two other Circuit Courts of Appeal have held state a claim. Specifically, the Second and Third Circuits, ruling on motions to dismiss involving statutes and allegations that are in all relevant respects identical to those at issue here, held that the allegations state claims for violations of the Sherman Act and Commerce Clause, while the Eighth Circuit reached the opposite conclusion. Respondent downplays this conflict by citing cases decided at the trial or summary judgment stage. Those decisions are irrelevant to a determination of whether Grand River's Complaint *pleads a claim for relief*. Respondent also ignores Grand River's allegations about the corrosive effect on the MSA and Escrow Statutes on competition and their disparate treatment of identically situated manufacturers.

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1. The defined terms that were used in the Petition are also used herein.

REASONS FOR GRANTING THE PETITION

I. A CIRCUIT CONFLICT EXISTS ON THE SHERMAN ACT AND COMMERCE CLAUSE CLAIMS

A. *Sherman Act Claim*

Respondent maintains that Grand River's assertion of a Circuit conflict on the Sherman Act claim "arises from the fact that the Second and Third Circuits, reading different allegations about different state actions, reached different conclusions than the Eighth Circuit as to whether the conclusory claims before them should have been dismissed pursuant [to] Fed. R. Civ. P. 12(b))(6)." Br. 17-18. Hence, Respondent contends that because the three decisions supposedly involve different factual backgrounds, conflict analysis is inappropriate. That argument is incorrect, as demonstrated by two facts that Respondent does not really dispute: (1) the Escrow Statutes at issue in the three decisions *have the exact same language*; and (2) *the allegations in the actions were identical in all relevant respects*. Notably, Respondent's accusation that Grand River has filed multiple lawsuits "regarding similar factual claims" belies Respondent's contention that the decisions are factually dissimilar. Br. 29.

Respondent argues that "in *Freedom Holdings* the Second Circuit, for purposes of reviewing a Rule 12(b)(6) dismissal, accepted as true certain conclusory allegations in the complaint." Br. 19. That is correct — the Second Circuit reviewed New York's Escrow Statute and the plaintiff's allegations, and ruled that the

plaintiff had pleaded a claim for a Sherman Act violation.[2] *Freedom Holdings v. Spitzer*, 357 F.3d 205, 226 (2d Cir.), *rehearing denied*, 363 F.3d 149, *on remand*, 447 F. Supp.2d 230 (S.D.N.Y. 2004); *see also Grand Enterprises Six Nations, Ltd. v. Pryor*, 2004 WL 1594869 at *2-3 (S.D.N.Y. July 15, 2004) (adopting *Freedom Holdings* and holding Grand River pleaded a Sherman Act claim). The Eighth Circuit did the same analysis (except it reviewed the Amendment) and held that Grand River did not plead a Sherman Act violation. *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 939-941 (8th Cir. 2009) ("*Grand River II*"). Plainly, a Circuit split exists.

Attempting to salvage its position, Respondent advances the muddled thesis that "the Second and Eighth Circuits, while applying the same basic legal principles, disagreed about the extent of their obligation to accept conclusory allegations within the complaint as true." Br. 19. But the decisions do not support the proposition that their conflicting holdings are the product of a disagreement over the extent to which the plaintiff's allegations should be accepted as true.[3] *Compare Freedom Holdings*, 357 F.3d 205 & *Grand River II*, 574 F.3d 929.

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2. Respondent suggests that the Second Circuit might have ruled differently in *Freedom Holdings* if the case was decided after the Court's decision *in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Br. 19. No explanation is offered as to how that decision might have changed the Second Circuit's decision. *See id.*

3. Nor does Respondent explain the nature of the supposed disagreement between the Circuits.

Tacitly acknowledging a conflict exists, Respondent changes the subject by ascribing significance to two decisions by the Southern District of New York. Br. 19-20 (*citing Freedom Holdings, Inc. v. Cuomo*, 592 F.Supp.2d 684 (S.D.N.Y. 2009), *appeal docketed*, No. 09-0547 (2d Cir. Feb. 10, 2009); *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2006 WL 1517603 (S.D.N.Y. 2006), *aff'd*, 481 F.3d 60 (2d Cir. 2007)). However, those decisions are not relevant because Grand River's issue is whether it alleged a *prima facie* claim that the MSA and Amendment violate the Sherman Act – the cited cases involve dispositions at the final judgment and preliminary injunction stage and do not address the pleading issue. *See id.* The fact that one litigant did not ultimately prove its claim is not a basis for dismissing Grand River's claim, and Respondent does not cite any authority for that proposition.

Further, Respondent comments that the Southern District of New York decisions mean

> [t]here is no reason at present to believe that the final judgment in either of these two cases in the Second Circuit will produce a conflict with the Eighth Circuit's decision in this case, but if such a conflict does arise, this Court, can consider whether to address it at that time.

Id. at 20. The ultimate resolution of those actions is not germane to conflict analysis – what matters are the Circuit rulings on what constitutes a claim for relief under the Sherman Act. However, by the time the Second Circuit ultimately rules on Grand River's

Sherman Act claim, the Court will have long ago decided whether to grant *certiorari* on the current Petition, and Respondent's suggestion that Grand River can somehow resuscitate the Petition is absurd.

Similarly, Respondent argues that the Third Circuit's decision in *A.D. Bedell Wholesale Co., Inc. v. Phllip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), which found a Sherman Act claim, "was merely a pleading case," but that point dictates in favor – not against – granting *certiorari*. Br. 20. Respondent correctly observes "*the Third Circuit disagreed with the Eighth Circuit . . . with regard to the sufficiency of particular allegations about the MSA and related legislation at the motion-to-dismiss stage*." *Id.* (emphasis added). The split Respondent describes is the conflict that requires resolution by the Court.

Respondent contends that the Eighth Circuit's decision accords with *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), and that "[t]he Allocable Share Amendment, whether considered by itself or in conjunction with the MSA, does not mandate or authorize private parties to engage in *per se* violations of the Sherman Act, nor does it place irresistible pressure on them to do so in order to comply with the statute." Br. 22. Respondent ignores that in *Freedom Holdings*, the Second Circuit relied on *Rice* and its progeny to explain the first step in its analysis. *Freedom Holdings*, 357 F.3d at 222-23. Further, contrary to Respondent's position, the Second Circuit found, as Grand River has noted, that:

> In short, plaintiffs allege that the combination of the MSA, the Escrow Statutes, and the

> Contraband statutes, allows OPMs to set supracompetitive prices that effectively cause other manufacturers to charge similar prices or to cease selling.
>
> The alleged arrangement . . . . would be a per se violation because it is a naked restraint on competition . . . .

Id., 357 F.3d at 226. Hence, the Second Circuit disagrees with Respondent about the legal significance of Grand River's allegations.

Respondent argues that the Amendment does not implement "a 'hybrid restraint' by granting a private party 'a degree of private regulatory power that allows that party to compel other private actors to follow its pricing or other 'private marketing decisions.'" Br. 22-23 (*quoting Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986)). Leaving aside this assertion goes well beyond Grand River's allegations and ascertaining its accuracy would require extensive discovery, *Rice* is instructive on this issue as Justice Stevens stated that "[a] statute [that] contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision" constitutes a hybrid restraint. *Rice*, 458 U.S. at 665-66 (Stevens, J., concurring).

Despite Respondent's assertion to the contrary, the anticompetitive effects of the Amendment are not solely the result of legislative action. Rather, they are the product of a private agreement among competitors to fix costs (a component of price) among them, and a further agreement to impose equivalent costs on

competitors through the non-market mechanism of the Arkansas Statue (and the forty-five other Escrow Statues), as amended by the Amendment (and identical amendments to the other Escrow Statutes). Thus, the Amendment enforces a hybrid restraint of trade.

Respondent implies there is no authority for the proposition that state legislation that imposes on competitors a parallel cost or pricing structure agreed to by and among other competitors violates the Sherman Act and may be preempted as a hybrid restraint of trade. Br. 22-23. In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951), the Court ruled: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." Subsequently, the Court repeated this admonition, observing that the legislation at issue in *Schwegmann* was a hybrid restraint of trade subject to preemption under the Sherman Act. *Fisher*, 475 U.S. at 268. The agreements entered into by certain retailers in *Schwegmann*, although sanctioned under Louisiana law, were prohibited by the Sherman Act because they affected the pricing of competitors. *Schwegmann*, 341 U.S. at 389-90.

B. *Commerce Clause Claim*

Respondent's Commerce Clause analysis is flawed for many of the same reasons as its antitrust analysis. Despite conceding the Second Circuit held that Grand River pleaded a claim, Respondent attempts to circumvent the Circuit split by invoking its argument that the only disagreement was the extent to which the Circuits were willing to accept Grand River's allegations. Br. 24 (*citing Grand River Enterprises Six Nations, Ltd.*

v. Pryor, 425 F.3d 158, 164 (2d Cir. 2005) ("*Grand River I*"), *cert. den.*, 549 U.S. 951 (2006)). Respondent again fails to explain how the Circuits differed in their willingness to accept the allegations. Moreover, despite Respondent suggesting otherwise (Br. 24), on a Rule 12(b)(6) motion a court is obligated to accept the truth of the plaintiff's allegations – the Second Circuit did that and ruled that Grand River had stated a claim for a Commerce Clause violation, while the Eighth Circuit reached the opposite conclusion. *Grand River I*, 425 F.3d at 164; *Grand River II*, 574 F.3d at 944.

Respondent ascribes significance to the Southern District of New York denying Grand River's request for a preliminary injunction. Br. 24. But that argument is meritless because this case involves the pleading stage (not a preliminary injunction motion) and the allegations that are sufficient to state a claim that the combined effect of the MSA and Amendment violates the Commerce Clause.[4] Accordingly, Respondent's contention that "[n]ow that the *Freedom Holdings* and *Grand River* cases have progressed beyond the pleading stage, any concern that there is a conflict based on the Second Circuit's earlier decision relying on unproven allegations has been dissspelled" is misguided because it is the pleading stage that is at issue. Br. 25. The conflict between the Circuits cannot be explained away by Respondent's tortured reading of inapposite case law.

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4. In any event, the Second Circuit affirmed the denial of the preliminary injunction based on a finding that it had not been shown that enforcement of the MSA measures at issue would cause irreparable harm pending a final decision in the case. *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 63 (2d Cir. 2007).

Respondent argues the Amendment is constitutional because it is "facially restricted solely to Arkansas, the State is not regulating commerce occurring in other states." Br. 26. But a manufacturer whose cigarettes are sold in Arkansas must comply with the Amendment in one of two ways: (1) enter into a national settlement with *all* 46 MSA States, pursuant to which *annual "settlement" payments are calculated based on its national sales volume*; or (2) annually fund an escrow account for Arkansas' benefit in an amount that is ultimately calculated and determined based on the MSA and *the amount the manufacturer would have paid to all MSA States* on account of its sales in Arkansas. Ark Code Ann. § 26-57-261. In either event, the manufacturer's liability is not based solely on its Arkansas sales, but is a function of a national payment scheme that ultimately depends on nationwide sales. That system is a direct, extraterritorial application of the Amendment that regulates interstate commerce.

II. GRAND RIVER RAISES ISSUES OF NATIONAL AND CONSTITUIONAL SIGNIFICANCE

Respondent asserts that Grand River "does not assert that its claims against the Arkansas Allocable Share Amendment raise issues of national importance." Br. 27. In actuality, Grand River stated that its Sherman Act and Commerce Clause claims present fundamental issues of antitrust and constitutional law.[5] Petition 15,

5. Respondent also maintains that certification should be denied because state governments and private parties are making plans based on previous decisions upholding the MSA and its implementing legislation. Br. 27-29. Obviously, that is not a basis for upholding the Amendment if it violates the Sherman Act or is unconstitutional.

20. Further, the Petition states that Grand River's other constitutional claims involve significant constitutional issues. *Id.* 22, 25 & 26.

In a convoluted passage, Respondent argues that Grand River is deserving of being subject to a Circuit split due to its decision to file MSA related lawsuits in two jurisdictions. Br. 28-29. Aside from acknowledging that a Circuit split exists, the suggestion that the Court should rule against Grand River because it had the temerity to file lawsuits in two jurisdictions is absurd. As Grand River previously explained, when the Southern District of New York litigation was filed, Arkansas had not threatened to enforce the Arkansas Statute against Grand River. Once threats were made, Grand River commenced the Arkansas litigation.

III. THE EIGHTH CIRCUIT IMPROPERLY DISMISSED GRAND RIVER'S OTHER CONSTITUTIONAL CLAIMS

A. *Equal Protection Claim*

Respondent's analysis of the Equal Protection Claim is largely devoted to analyzing the appropriate standard of review, and concludes that because the Amendment is supposedly "a straightforward example of health and economic regulatory legislation," the rational basis test should be employed. Br. 29-30. However, it is settled that the Equal Protection Clause bars government from treating differently persons who are alike in all relevant respects. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Distinctions that burden constitutionally protected rights are subject to strict scrutiny. *Cleburne v. Cleburne*

Living Center, 473 U.S. 432, 439 (1985). For the reasons stated in the Petition, Grand River submits that the Eighth Circuit's acknowledgement of the disparate treatment of NPMs (App. A, 29a), combined with Grand River's allegations concerning the MSA's infringement of First Amendment rights (discussed below), mandates application of strict scrutiny.

But even under the rational basis test, the Eighth Circuit did not articulate a logical basis regarding why it is constitutionally permissible for Exempt SPMs to be offered the opportunity to join the MSA with payment exceptions amounting to hundreds of millions of dollars annually, but Grand River is denied those same exemptions. Respondent contends that the Eighth Circuit correctly found that the difference "'was rationally related to the state's legitimate interest in collecting future medical costs related to tobacco use.'" Br. 30. But this ignores that the enactment of the Amendment had nothing to do with medical costs that Arkansas might incur as a result of consumers using Grand River's products. Rather, the Amendment was passed because the MSA (which settled wrongdoing by the OPMs, not NPMs like Grand River) provided for severe financial penalties if an MSA State did not enact an Escrow Statute. But that has no relation to Grand River or future medical costs, and it certainly is not a rational basis for requiring Grand River to make escrow payments, while no such burden is imposed on Exempt SPMs.

B. *Due Process Claim*

Respondent does not address the substance of Grand River's due process argument, and instead takes refuge in the Eighth Circuit's analysis pursuant to *Matthews v. Eldridge*, 424 U.S. 319 (1976). Br. 33-34. While providing a cursory review of the Eighth Circuit's decision, Respondent (and the Eighth Circuit) ignores that Arkansas does not have any interest in holding Grand River's funds in escrow for twenty-five years since the act of manufacturing cigarettes, by itself, is not a basis for liability.[6] Further, the other factor identified by the Eighth Circuit – "escrow payments are tied directly to the number of cigarettes an NPM sells an Arkansas" (App. A, 32a) – is simply inaccurate because, as discussed above, payments are a function of nationwide sales.

C. *First Amendment Claim*

Finally, Respondent argues that the Eighth Circuit properly found that the Amendment passes First Amendment muster because NPMs "are not penalized financially for refusing to give up their First Amendment rights." Br. 35. That is inaccurate because OPMs and Exempt SPMs are afforded enormous financial benefits for joining the MSA and agreeing to

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6. The Eighth Circuit justified the holding of escrowed funds for 25 years on the ground that interest is paid on the funds. *Grand River II*, 574 F.3d at 945. The interest payments hardly warrant the government dictating the use to which a company's assets are put, particularly given the absence of any allegation of wrongdoing by Grand River and the acknowledgement that Grand River has a "private interest in any escrow payments." *Id.*

restrict their First Amendment rights, a proposition not disputed by Respondent. Petition 35-36. Conversely, an NPM, such as Grand River, which refuses to restrict its First Amendment rights, is denied those same financial benefits (which renders it unable to compete with Exempt SPMs). This bargain of money for speech implicates the First Amendment, and Grand River has pleaded a *prima facie* claim for the reasons set forth in the Petition.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in its Petition for a Writ of Certiorari, Petitioner, Grand River Enterprises Six Nations, Ltd., respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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